



The Court of Appeal for Bermuda

CIVIL APPEAL No. 2 of 2010

Between:

BETTY SUE SIMMONS

Appellant

-V-

OTTIWELL A. SIMMONS

Respondent

Before: Edward Zacca, President
Anthony Evans, JA
Scott Baker, JA

Appearances: Mr. Richards/ Mrs. Georgia Marshall for Appellant
Mr. Banister for Respondent

JUDGMENT

Date of Hearing:	Thursday, 3 March 2011
Date of Judgment:	Thursday, 18 March 2011
Reasons for Judgment	Monday, 9 May 2011

Scott Baker, JA

1. This is a wife's appeal against an order of Justice Carlisle Greaves on the 15 March 2010 on her application for ancillary relief.

Facts

2. The brief salient facts are that the parties were married in 1983. The marriage was dissolved in 2009. The wife is now in her mid seventies and the husband in his late seventies. There are no children but the wife has an adult son by a former union and the husband has three adult children of whom two survive. The matrimonial home is 2 Harvey Road. Both parties still live there. It is free of encumbrances valued at \$1,135,553. It is not disputed on the appeal that the wife should be treated as having a half share which is what the judge awarded her.
3. There are two trust properties, 5 Palmetto Road and Fenton Drive. These were purchased by the husband for he said, the children. The husband, the wife and the husband's three children, two of whom survive, are beneficiaries of the Ottiwell Simmons Trust. But the husband controls the trust. The money came from the husband and the judge found that the wife never considered these properties as matrimonial assets.
4. 5 Palmetto Road, I speak of the equities is worth \$620,971 and Fenton Road \$644,489. The original contentions were in respect of these two properties—by the husband that they were nothing to do with the wife and they should not be brought into the reckoning and by the wife that they were matrimonial assets in which she was entitled to a half share. However, this appeal was earlier adjourned before a different constitution of this Court when the wife said that she did not want to do the children out of their interests. Her lawyers had not previously made that clear.
5. Both 5 Palmetto Road and Fenton Drive have mortgages that are paid for out of the rental income. That income comes from these properties and from another property that the husband owns, East Gate, Lane which he inherited from his late father and that is outside the trust. The husband's daughter and her family live in Fenton Drive. East Gate Lane is

valued at \$602,210. The husband also has \$270,000 in cash savings and there is a car worth \$10,000 which belongs to both the husband and the wife. The income of the husband is in total some \$8,837 a month which comes from his pension and from rents and this is in total around \$106,000 a year.

6. The wife's position is that she has a house in the United States, bought in 2003 for \$35,000, a share in a condominium also in the United States bought fifteen or twenty years ago, to which her contribution was \$7,000. Her income is \$2,550 a month from pension, \$1,779 a month from teaching, and \$450 from rent of the US house. That comes, if my calculations are correct, to around \$57,348 per annum.
7. The furniture at Harvey Road is worth \$17,000 and it's not in dispute that that should be divided equally.

Discussion

8. Some of the judge's findings are in my judgment unsustainable, in particular, the ring fencing of some of the parties' assets assessing the appropriate lump sum.
9. The trust properties, 5 Palmetto Road and Fenton Drive have five potential beneficiaries: the husband, the wife, the two surviving children, and the deceased child's estate. Although it does not follow that the value of these properties would eventually be divided into five equal shares, it is convenient to allocate a notional share of 20% to the husband and 20 % to the wife. Just as the judge wrongly ring fenced some of the husband's assets, so he wrongly ring fenced the wife's assets. In my view all the assets of both the husband and the wife should have been treated initially, at least, as part of the matrimonial pot because the size of the total pot is relevant in deciding what lump sum the wife should be awarded.
10. As a result of the Judge's erroneous ring fencing of the wife's assets, the Court had no adequate evaluation of them. There are deficiencies in the wife's case not only in this regard but also in the absence of any evidence before the Court to show what the cost of meeting her reasonable requirements of purchasing a house in Bermuda would be.

11. The judge said that there appeared to be some merit in an argument suggesting a suspicious non-disclosure on the part of the wife but that it was irrelevant because these assets were always treated separately from the matrimonial pot and could not be counted toward a reduction of the lump sum the husband should pay her. In my judgment, the judge fell into error in this regard and the Court is left with the difficulty in assessing what value to attribute to the wife's assets. Doing the best I can, I would put the following figures on her assets. House in America \$61,000, her share in the condominium \$20,000 and her savings \$3,000, making a total of \$84,000. The wife says she has debts of \$80,000 by way of legal fees but the costs of these proceedings have not yet been dealt with.
12. The judge's Order gave the wife half the value of the matrimonial home and one sixth of the husband's \$270,000 savings, half the furniture and half of the value of the car. If the wife has a lump sum to reflect half the matrimonial home, \$568,000, 20 % of Palmetto \$124,000, 20% of Fenton Drive \$129,000 and one sixth of the \$270,000 cash savings i.e. \$45,000, she would have a total of \$866,000 by way of lump sum. That however, would still leave a very substantial imbalance of assets in favor of the husband. The value of East Gate is put at \$604,000 and the husband's cash \$270,000. This adds up to \$874,000. I do not think that East Gate should be ring fenced and that the wife should only have one sixth of the \$270,000 as the judge concluded. The criteria in section 29 of the Matrimonial Causes Act 2976 are well known and I do not repeat them. As was said by Lord Nicholls in *Miller* [2006] UK HL 24 par 11 when the marriage ends, fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties housing and financial needs taking into account a wide range of matters such as the parties ages, their future earning capacity, the family standard of living and any disability of either party. If one quarter of the value of East Gate and the husband's cash were allocated towards the wife's lump sum that would give her \$821,000 plus \$218,000 equals \$1,039,000.00. Taking the bigger fraction of one third, that would take the figure to \$821,000 plus \$291,000 = \$1,112,000. A lump sum of \$1,050,000.00 which is what I would propose leaves the parties in broadly the following asset position.

Husband:

Half of Harvey Road \$ 568,000.00

20% of Palmetto Road	\$ 124,000.00
20% of Fenton Drive	\$ 129,000.00
Remains of East Gate and Cash	<u>\$ 645,000.00</u>
	\$1,466,000.00

I have of course rounded off all the figures.

Wife:

Lump Sum	\$1,050,000.00
Existing assets	<u>\$ 84,000.00</u>
	\$1,134,000.00

13. The car and the furniture were not the subject of the appeal. The wife has a costs liability of \$80,000 but I would leave that out of account to be dealt with separately in relation to the question of costs. The husband also has access to the 60% of the trust properties that have been taken out of account as being notionally the children's. He would nevertheless, as trustee and a beneficiary, be able to continue to utilize those monies without depriving the children of their interest.
14. I would therefore allow the appeal and vary the judge's Order to the following extent. The husband to pay the wife a lump sum of \$1,050,000 within a period to be determined, on payment of which she is to vacate the matrimonial home. This payment would be in satisfaction of her interest in the trust and in the matrimonial home and any further interest she could conceivably claim in the husband's assets. I would leave paragraphs 3 and 4 of the judge's Order which relate to the car and the furniture in Harvey Road undisturbed.
15. The suggested order for consideration of counsel would be in the following terms. The Order of the judge of the 15th March 2010 is varied in that
 1. The Respondent shall pay the petitioner a lump sum of \$1,050,000 within 90 days
 2. On payment of the lump sum the petitioner shall vacate the matrimonial home, 2 Harvey Road;

3. Payment of the lump sum is in full and final satisfaction of any claim that the petitioner may have against 1) the Respondent, 2) The matrimonial home—2 Harvey Road, and 3) The Ottiwell Simmons Trust.
4. Paragraphs 3 and 4 of the Judge’s Order shall stand with liberty to apply.
5. Costs of the appeal to the wife to be taxed if not agreed.

Signed

Scott Baker, JA

I agree,

Signed

E. Zacca, President

Signed

I agree,

Anthony Evans, JA